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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**TONY CLARK and PAMELA ELY,**

Plaintiffs,

v.

**FORD MOTOR COMPANY, a  
Delaware corporation; and DOES 1  
through 10, inclusive,**

Defendants.

**Case No.: 2:22-cv-03069-SVW-  
GJS**

(Removed from Superior Court of  
California, County of Los Angeles,  
Case No. 22STCV11319)

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF PLAINTIFFS'  
NOTICE OF MOTION AND  
MOTION FOR REMAND TO  
SUPERIOR COURT OF  
CALIFORNIA**

*Assigned for All Purposes to the  
Honorable **Stephen V. Wilson***

**Date: July 11, 2022**

**Time: 1:30 p.m.**

**Courtroom: 10A**

Action Filed: April 1, 2022

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

Plaintiffs Tony Clark and Pamela Ely (“Plaintiffs”) filed this action against Defendant Ford Motor Company (“Defendant” or “Ford”) in the Superior Court of California, County of Los Angeles, on April 1, 2022, concerning a 2020 F-350 pickup truck (the “Subject Vehicle”) manufactured by Ford with serious defects and nonconformities to warranty, including to the engine, among other things. The Complaint alleges two causes of action under California’s Song-Beverly Consumer Warranty Act (“Song-Beverly”) for violation of the express and implied warranties. See Complaint, attached as Exhibit A to Declaration of Taylor Sullivan, Dkt. No. 1-2, ECF pp. 8-12.

Ford removed this case on May 6, 2022. However, removal is improper as Ford has failed to meet its burden to establish that the amount in controversy requirement is met in this case. Ford contends, contrary to the great weight of authority, that simply because Plaintiffs seeks incidental and consequential damages, civil penalties and attorneys’ fees in addition to a repurchase under Song-Beverly, speculative estimates of such damages, penalties and fees must be included in the amount in controversy to establish that this Court possesses diversity jurisdiction. See Notice of Removal, Dkt. No. 1, ECF pp. 3-5. At this stage, Ford has not met its burden by preponderance of the evidence, more likely than not, that Plaintiffs will obtain such damages, penalties and fees at trial thereby exceeding the \$75,000 amount in controversy.

Ford’s conclusory statements alone set forth in its Notice of Removal are insufficient to meet its burden of proving that removal was proper, and do nothing to establish that the amount in controversy requirement has been met. Ford’s calculation of potential incidental and consequential damages and civil penalties to be awarded in this case is speculative and flawed. Similarly and with no supporting

evidence, Ford argues that attorney's fees in this action should also be considered as part of the amount in controversy. Ford does not, however, offer any evidence or calculation whatsoever for attorney's fees in this matter to render a finding by this Court that they should be considered in determining the amount in controversy.

Accordingly, Ford's removal was improper and this case should be remanded to California State Court because there are no grounds to establish federal subject matter jurisdiction pursuant to either federal question jurisdiction, (28 U.S.C. § 1331) or diversity jurisdiction (28 U.S.C. § 1332) theories.

## **II. BRIEF STATEMENT OF FACTS**

On or around March 22, 2020, Plaintiffs purchased the Subject Vehicle new. Plaintiffs experienced a number of problems with the Subject Vehicle and took it in for repairs on several occasions to address them. See Complaint, Dkt. No. 1-2, ECF pp. 8-12, generally. However, the problems persisted following each repair attempt. Id. Plaintiffs initiated this action on April 1, 2022 in the Superior Court of California, County of Los Angeles.

## **III. STANDARDS FOR REMOVAL AND REMAND**

To survive a motion for remand, a defendant seeking removal has the burden of proving that federal subject matter jurisdiction is present. *Marin General Hospital v. Modesto & Empire Traction Co.*, 581 F.3d 941, 944 (9th Cir. 2009) (citing *Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998)). There is a "strong presumption against removal jurisdiction," and courts must reject it "if there is any doubt as to the right of removal in the first instance." *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1107 (9th Cir. 2010). A court must remand a matter to the jurisdiction from which it was removed upon finding that the court lacks subject matter jurisdiction at the time of removal. *Bromwell v. Michigan Mut. Ins. Co.*, 115 F.3d 208, 213 (3d Cir. 1997). "The removal statute is strictly construed, and any doubt about the right of removal requires resolution in favor of

1 remand.” *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1244 (9th Cir.  
 2 2009) (citing *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992)); *see also Hunter*  
 3 *v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (“[T]he court resolves all  
 4 ambiguity in favor of remand to state court.”).

5 Where the purported basis for federal subject matter jurisdiction is diversity  
 6 jurisdiction, a defendant seeking removal must establish that there is complete  
 7 diversity of citizenship between the parties, and the amount in controversy exceeds  
 8 \$75,000. 28 U.S.C. § 1332. Where the amount in controversy is not clear from the  
 9 face of the complaint, the removing defendant must establish by a *preponderance of*  
 10 *the evidence* that the amount-in-controversy requirement is satisfied. *Urbino v.*  
 11 *Orkin Servs. of Cal., Inc.*, 726 F.3d 1118, 1121–22 (9th Cir. 2013)(emphasis added).

12 Conclusory allegations as to the amount in controversy are  
 13 insufficient. *Matheson v. Progressive Specialty Insurance Co.*, 319 F.3d 1089, 1091  
 14 (9th Cir. 2003). Nor can a defendant establish the amount in controversy by “mere  
 15 speculation and conjecture.” *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193,  
 16 1197 (9th Cir. 2015). Rather, the defendant should “submit evidence outside the  
 17 complaint, including affidavits or declarations, or other summary-judgment-type  
 18 evidence relevant to the amount in controversy at the time of removal.” *See*  
 19 *id.* (quoting *Singer v. State Farm Mut. Auto Ins. Co.*, 116 F.3d 373, 377 (9th Cir.  
 20 1997)) (internal quotation marks omitted).

#### 21 **IV. ARGUMENT: FORD HAS FAILED TO ESTABLISH THAT THE** 22 **AMOUNT IN CONTROVERSY IS MET**

23 Ford has failed to show by a preponderance of the evidence that the amount  
 24 in controversy exceeds \$75,000. Ford’s amount in controversy analysis is  
 25 insufficient for a number of reasons. First, Ford provides no evidence of the actual  
 26 purchase price of the Subject Vehicle. Ford states only that the “original suggested  
 27 retail price” of the Subject Vehicle is \$48,695.00. Notice of Removal ¶19, Dkt. No.  
 28 1, ECF p. 5. Ford also does not even attempt to justify an assumed maximum civil

1 penalties award in this case or show that it is more likely than not that civil penalties  
 2 will be awarded. Further, Ford's assertion that Plaintiffs' potential attorneys' fees  
 3 should count towards the amount-in-controversy is also speculative and cannot form  
 4 the basis for an amount-in-controversy calculation. Thus, Ford has not met its  
 5 burden and has failed to establish that this Court has subject matter jurisdiction over  
 6 the instant action. This case should be remanded.

7 **A. Ford's Amount in Controversy Calculation Fails Because Its Civil**  
 8 **Penalties Estimate is Speculative**

9 A civil penalty is applicable only if a court determines that a defendant's  
 10 failure to comply with the Act is willful. Cal. Civ. Code §§ 1794(c). This amount is  
 11 to be determined by the trier of fact based on the specific facts of the case. Thus,  
 12 civil penalties are speculative at this point. Where a manufacturer has not offered  
 13 any evidence to support an award for civil penalties, the Court is unable to determine  
 14 what civil penalties might be imposed and thus cannot conclude the amount in  
 15 controversy. In *Zawaideh v. BMW of North America, LLC*, No. 17-CV-2151 W  
 16 (KSC), 2018 WL 1805103, at \*2 (S.D. Cal. Apr. 17, 2018), the court noted that  
 17 "[r]ather than simply assume that because a civil penalty is available, one will be  
 18 awarded, the defendant must make some effort to justify the assumption by, for  
 19 example, pointing to allegations in the [c]omplaint suggesting award of a civil  
 20 penalty would be appropriate, and providing evidence—such as verdicts or  
 21 judgments from similar cases—regarding the likely amount of the penalty." Ford  
 22 has provided no such evidence and thus it has failed to show that civil penalties  
 23 should be included in the amount in controversy calculation. See *Ronquillo v. BMW*  
 24 *of North America, LLC*, No. 3:20-cv-1413-W-WVG, 2020 WL 6741317 (S.D. Cal.  
 25 Nov. 17, 2020); *D'Amico v. Ford Motor Company*, No. CV 20-2985-CJC (JCx),  
 26 2020 WL 2614610 (C.D. Cal. May 21, 2020); *Sood v. FCA US, LLC*, NO. CV 21-  
 27 4287-RSWL-SKx, 2021 WL 4786451 (C.D. Cal. Oct. 14, 2021); *Vega v. FCA US,*  
 28 *LLC*, No. 2:21-cv-05128-VAP-MRWx, 2021 WL 3771795, \*3 (C.D. Cal. Aug. 25,

2021); *Esparza v. FCA US LLC*, No. 2:21-cv-01856-RGK-MRW, 2021 WL 949600, at \*1 (C.D. Cal. Mar. 12, 2021); *Garcia v. FCA US LLC*, 2:20-cv-04779-VAP-MRWx, 2020 WL 4219614, \*3 (C.D. Cal. July 22, 2020); *Chavez v. FCA US LLC*, No. 2:19-cv-06003-ODW (GJSx), 2020 WL 468909, \*2 (C.D. Cal. 2020); *Lopez v. FCA US LLC*, No. 2:19-cv-07577-RGK-MRW, 2019 WL 4450427, \*2 (C.D. Cal. Sep. 16, 2019); *Eberle v. Jaguar Land Rover N. Am., LLC*, No. 2:18-cv-06650-VAP (PLAx), 2018 WL 4674598, at \*2 (C.D. Cal. Sept. 26, 2018) (collecting cases).

Ford has not offered any evidence whatsoever to support an award for civil penalties, and thus, it is unable to establish in its Notice of Removal what civil penalties might be imposed. Ford's Notice of Removal merely points to Plaintiffs' civil penalties claim in their Complaint and asserts that this alone is sufficient to establish that the maximum amount of civil penalties should be included in the amount in controversy. Notice of Removal ¶19, Dkt. No. 1, ECF p. 5. "Simply assuming a civil penalty award is inconsistent with the principle that the defendant must provide evidence that it is 'more likely than not' that the amount in controversy requirement is satisfied." See *Makol v. Jaguar Land Rover North America, LLC*, No. 18-cv-03414-NC, 2018 WL 3194424, at \*3 (N.D. Cal., June 28, 2018) (remanding action to state court) (quotations and citation omitted); *Castillo v. FCA US LLC*, No. 19-cv-151-CAB-MDD, 2019 WL 6607006, at \*2 (S.D. Cal. Dec. 5, 2019) (remanding action to state court *sua sponte* and reasoning in part that "[t]he civil penalty under California Civil Code § 1794(c) cannot simply be assumed. While courts frequently treat the civil penalty under Song-Beverly as a form of punitive damages that may be appropriately included in an amount-in-controversy calculation, [the d]efendant has made no showing that such a civil penalty is more likely than not to be awarded here.") (citing *Herko v. FCA US, LLC*, 2019 WL 5587140, at \*2 (S.D. Cal. Oct. 30, 2019)); see also *Khachatryan v. BMW of N. Am.*,



1 *LLC*, No. CV 21-1290 PA (PDX), 2021 WL 927266, at \*2 (C.D. Cal. Mar. 10, 2021);  
 2 *Lopez*, 2019 WL 4450427, at \*2; *Eberle*, 2018 WL 4674598, at \*2.

3 Here, Ford has provided no evidentiary basis for the Court to evaluate civil  
 4 penalties for inclusion into the amount in controversy requirement. Ford contends  
 5 that Plaintiffs are seeking from \$75,301.96 to \$97,390.00 in civil penalties. Notice  
 6 of Removal ¶19, Dkt. No. 1, ECF p. 5. These amounts rely solely on an assumption  
 7 that a jury would award the maximum civil penalty based on another assumption  
 8 about the price of the Subject Vehicle. These amounts for civil penalties are  
 9 speculative at best and amount to nothing more than an empty presumption that  
 10 Plaintiffs will recover the maximum civil penalties permitted in Plaintiffs' Song-  
 11 Beverly claims. At this stage, Ford has not shown that it is more likely than not that  
 12 civil penalties will be awarded at all. Ford has failed to show that the amount in  
 13 controversy is met.

14 **B. Ford Fails to Meet Its Burden to Prove that the Amount in Controversy**  
 15 **Requirement Is Satisfied by the Inclusion of Speculative Amounts of**  
 16 **Attorneys' Fees**

17 A defendant may attempt to prove future attorneys' fees should be included  
 18 in the amount in controversy, but retains the burden of proving the amount of such  
 19 future attorneys' fees by a preponderance of the evidence. *Fritsch v. Swift*  
 20 *Transportation Co. of Arizona, LLC*, 899 F.3d 785, 788, 794 (9th Cir. 2018). In  
 21 *Brady v. Mercedes Benz USA, Inc.*, 243 F.Supp.2d 1004, 1011 (N.D.Cal. 2002), the  
 22 court included an estimate of future attorneys' fees in the amount in controversy, but  
 23 only because the parties had included both a declaration from plaintiff's counsel  
 24 stating his hourly rate and an estimate of fees incurred to date, and a declaration from  
 25 defendant's counsel detailing fee awards (not requests) in similar lemon law cases  
 26 to calculate the amount in controversy. See *Sood*, 2021 WL 4786451 at \*6.

27 There is an insufficient showing for amount in controversy regarding  
 28 attorneys' fees where a "[d]efendant makes no effort to explain what amount of

1 attorney fees might be sought or awarded in this case, neglecting to include so much  
2 as an estimate of the hour or billing rates that might apply.” *Vega*, 2021 WL  
3 3771795, \*4, *Garcia*, 2020 WL 4219614, \*3; *Mahlmeister v. FCA US LLC*, No. CV-  
4 21-00564-ABA-FMX, 2021 WL 1662578, at \*3 (C.D. Cal. Apr. 28, 2021); *Eberle*,  
5 2018 WL 4674598, \*3 (finding defendant's claim that it is unaware of plaintiff's  
6 hourly rate but anticipates the fees to be in excess of the “less than \$5,000” amount  
7 stated in the plaintiff’s motion insufficient); *Conrad Assocs. v. Hartford Accident &*  
8 *Indemnity Co.*, 994 F. Supp. 1196, 1200 (N.D. Cal. 1998) (finding that a defendant  
9 failed to establish the amount in controversy when including attorneys' fees without  
10 estimating “the amount of time each major task will take,” or varying the hourly  
11 billing rate for each task); *Kinneberg v. Ford Motor Co.*, No. CV-20-00865-ABF-  
12 FMX, 2020 WL 3397752, at \*2 (C.D. Cal. June 18, 2020).

13 At no point does Ford explain what amount of fees might be awarded here  
14 should Plaintiffs even prevail; how it determined what attorney’s fees in this action  
15 will be or why they should be considered by this Court as part of the amount in  
16 controversy; what factors about this specific case make an award of attorneys’ fees  
17 more likely than not; or how or what other similar cases have resulted in fees that  
18 satisfy the amount in controversy. Ford does not provide any support for its claim  
19 as to what attorneys’ fees in this action are or could be—Ford simply asserts that  
20 attorneys’ fees in Song-Beverly actions “regularly exceed \$100,000.” Notice of  
21 Removal ¶18, Dkt. No. 1, ECF pp. 4-5. Absent any such evidence, attorneys’ fees  
22 are entirely speculative and cannot form the basis of an amount-in-controversy  
23 determination in this action.

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1       **V.     CONCLUSION**

2           For the foregoing reasons, Plaintiff respectfully requests that this case be  
3 remanded to California Superior Court because FCA has failed to meet its burden  
4 for removal.

5  
6 Dated:       May 31, 2022

**KNIGHT LAW GROUP LLP**

7  
8                               /s/ Phil A Thomas

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